
FINAL DRAFT

INTERPRETIVE and POLICY STATEMENT

DEPARTMENT OF ECOLOGY

Purpose: Pursuant to the Administrative Procedure Act, [RCW 34.05.230](#), the Department of Ecology submits the following:

Document Title: **2003 Municipal Water Law Interpretive and Policy Statement**

Subject: To describe and provide interpretation of parts of the Municipal Water Law, and describe generally applicable procedures that Ecology will use in managing municipal water rights.

Document Description: This interpretive and policy statement is a review of the applicable sections of the state Water Code (Ch. 90.03 RCW) that were amended or added by the 2003 Municipal Water Law. The document provides a description of how Ecology intends to apply the various sections of the law to municipal water management. This document is the second of four draft policy documents prepared by the Department of Ecology and the Department of Health. The first policy document is entitled Draft Section 5(2) Policy Statement, which was circulated for comment on February 17, 2006 and covers coordinated review of water system planning documents. A copy of the 5(2) Policy Statement can be found on Ecology's website at http://www.ecy.wa.gov/programs/wr/rights/muni_wtr.html. This second document contains Ecology's interpretation of elements of the Municipal Water Law that are within Ecology's sole jurisdiction. The third policy document is expected to be submitted in the coming months by the Department of Health covering policy issues that reside solely in Department of Health jurisdiction. The fourth document will be a Memorandum of Understanding between Ecology and Department of Health to address coordination efforts relative to water system planning review. Following review of comments received by the public on drafts of these documents, the agencies will consider the format and scope of final policy statements.

Effective Date: To be determined.

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1 *Final Draft*

2 *Washington State Department of Ecology*

3 *2003 Municipal Water Law*

4 *Interpretive and Policy Statement*

5 June 22, 2006

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8 The following statement is intended to clarify the Department of Ecology's position and

9 management approach regarding water rights following the enactment of the 2003 Municipal

10 Water Law (SECOND ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1338; Chapter 5,

11 Laws of 2003; 58th Legislature; 2003 1st Special Session; MUNICIPAL WATER SUPPLY--

12 EFFICIENCY REQUIREMENTS).

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14 This document is provided for those interested in and affected by management of water rights for

15 municipal supply purposes to understand Ecology's approach in interpreting and implementing

16 the law. It is also provided to enable Ecology staff who administer this law to have a common

17 understanding and consistency of application of the 2003 Municipal Water Law, which

18 incorporated elements of the "growing communities doctrine" into state law.

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20 Wherever possible, Ecology's goal is to be consistent in its review and decisions on municipal

21 water supply issues. While the following statements are intended to address many scenarios and

22 situations, there may be exceptions based on case-by-case review that do not conform to these

23 statements. This interpretive and policy statement interprets the 2003 Municipal Water Law but

24 does not comprise formal administrative regulations that have been adopted through a

25 rulemaking process.

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27 This document is organized by sections of the Water Code (Ch. 90.03 RCW) that were added or

28 amended by 2E2SHB 1338. An explanation is given for of each of the sections stating what

29 Ecology believes the section addresses, what it means, and how Ecology intends to apply that

30 section.

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32 ***RCW 90.03.015(4) DEFINITIONS of "Municipal Water Supplier" and "Municipal Water Supply***

33 ***Purposes***". This section defines water rights that are for municipal water supply

34 purposes.

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- 36 1. Municipal water suppliers can hold water rights for municipal water supply purposes.
- 37 2. Municipal water suppliers can hold water rights that are not for municipal water supply purposes.
- 38 3. Ecology evaluates compliance with the definitions in this section on a right-by-right basis.
- 39 4. If one purpose of use on a water right is for a municipal water supply purpose, then another purpose
- 40 of use beneficially used by the municipal water supplier under the same water right is for a municipal
- 41 water supply purpose of use if it is a beneficial purpose of use generally associated with a
- 42 municipality.

5. Beneficial purposes of use generally associated with a municipality are provided at the end of RCW 90.03.015(4) and in RCW 90.03.550.
6. If a municipal water supplier holds one water right that is for municipal water supply purposes, other water rights held by the municipal water supplier may or may not be for municipal water supply purposes.
7. If a municipal water supplier holds or acquires a water right that is not for municipal water supply purposes, the purpose of use may be changed to municipal water supply purpose under RCW 90.03.380 provided that the statutory tests for change are met and the beneficial use following the change will meet a definition in this section. Changes under RCW 90.03.380 require a tentative determination of the extent and validity of the water right proposed for transfer.
8. Ecology interprets the statute as requiring active compliance with the beneficial use definitions in RCW 90.03.015(4). If a water right holder's use of water does not meet the definition of a water right for municipal water supply purposes (e.g. by dropping below the residential connection or nonresident population thresholds), then the water right no longer qualifies as a right for municipal water supply purposes, and the exception to relinquishment for municipal water supply purposes rights under RCW 90.14.140(2)(d) cannot apply. If a water right holder's use of water does not meet the definition of a water right for municipal water supply purposes for 5 or more years, then the water right would be valid only to the extent it had been beneficially used during that period, with any nonuse resulting in relinquishment of the right unless the nonuse is excused by one of the other exemptions to relinquishment.

RCW 90.03.015(4)(a) DEFINITIONS – Defines required number of residential connections and non-residential population for municipal water supply rights. The statutory definitions in this subsection do not conform exactly to the Department of Health regulations for Group A water systems under WAC 246-290-020.

1. RCW 90.03.014(4)(a) provides statutory definitions for municipal water suppliers that overlap Department of Health regulations for Group A water systems, but they are not exactly the same.
2. All municipal water suppliers under this section are Group A water systems. However, not all Group A water systems are municipal water suppliers.
3. One difference between the statutory definition in this section and Department of Health regulations for Group A water systems is that the statute requires 15 or more *residential* connections while Department of Health regulations consider both *residential* and *non-residential* connections. Therefore, a water right serving 15 homes would be for municipal water supply purpose whereas a water right serving 14 homes and a business would not. However, both would be Group A water systems.
4. The statute does not define the term *residential service connection*. Ecology considers this term to be the same as that described in Department of Health regulations for Group A community water systems in WAC 246-290-020, "service connections used by year-round residents for one hundred eighty or more days within a calendar year". This is a subset of Department of Health's general definition of service connection in WAC 246-290-010, which is a connection to a public water system serving both residential and non-residential populations. By contrast, the municipal water law only considers residential service connections.
5. Ecology interprets the term residential service connection to mean the physical connection to a public water system, whereas the Department of Health regulations include provisions for alternative means of calculating the number of connections for a Group A water system, including formulas and counting "units" within a building.
6. In general, the following Group A water systems would be examples of municipal water suppliers because the statutory definitions are equivalent to those adopted in rule by Department of Health: a city, subdivision, mobile home park, water association.

7. Another difference between the statutory definition in this section and Department of Health regulations for Group A water systems is the statute does not include a definition for *residential populations* whereas Department of Health regulations do. For example, under WAC 246-290-020, a water system can be classified as a Group A community system if it serves at least 25 year-round residents regardless of the number of connections. A water right serving such a system would not be for municipal water supply under this section because the statute does not contain an equivalent definition. Some of the stand-alone Group A community water systems that would not be municipal water suppliers because of this difference may include some prisons, colleges, nursing homes, or other residential facilities.
8. While the statute does not include a service connection allowance for nonresidential connections, RCW 90.03.015(4)(a) does define a municipal water supplier in terms of nonresidential populations (residential water use for an average of 25 or more people for at least 60 days each year). This category includes some Group A non-community systems and excludes others.
9. Ecology interprets the phrase “residential use of water for a nonresidential population” to mean that the full range of residential water uses (e.g. drinking, cooking, cleaning, sanitation) are provided under the water right AND the service is for temporary domiciles for non-residents (an average of 25 or more people living there for more than 60 days per year, but not full-time). Examples of Group A non-community systems that might hold water rights for municipal water supply purpose under this section could include vacation homes and temporary farm worker housing.
10. The following Group A non-community systems would not typically hold rights under RCW 90.03.015(4)(a) for municipal water supply purpose under the residential water use for a non-resident population definition: schools, daycares, churches, campgrounds, fairgrounds, restaurants, businesses and factories.
11. Group B water systems are also defined in WAC 246-290-020 and are public water systems that are smaller than Group A systems, either in terms of connections or population. Water rights serving Group B water systems do not qualify as water rights for municipal water supply purposes under RCW 90.03.015(4)(a).

RCW 90.03.015(4)(b) Governmental Entities and Governmental Purposes. Defines water rights for municipal water supply purposes based on a function of beneficial use by a specific group of governmental entities.

1. The governmental entities listed in this subsection constitute an exclusive list. Those entities are: cities, towns, public utility districts, counties, sewer districts, or water districts. If an entity is not on the list, it is not a municipal water supplier for the purpose of this subsection (example: a port district or an irrigation district are not municipal water suppliers under RCW 90.03.015(4)(b)).
2. Governmental and governmental proprietary purposes generally refer to those purposes listed at the end of RCW 90.03.015(4), including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes.
3. A governmental or non-governmental entity that does not qualify as a municipal water supplier under this subsection (e.g. a port district) may qualify as a municipal water supplier under another subsection of RCW 90.03.015. However, governmental and governmental proprietary purposes do not refer to domestic uses that do not qualify under the more specific requirements of RCW 90.03.015(4)(a), (e.g. a water right for a domestic purpose that does not meet RCW 90.03.015(4)(a) cannot be conformed as water right for municipal water supply purposes under the more general “governmental” purpose in RCW 90.03.015(4)(b)).
4. When considering whether a right qualifies for a governmental purpose under this section (e.g. irrigation of parks), Ecology considers the entity that was issued the water right as well as the current owner of the right. If a water right was issued for irrigation of parks (or another governmental

purpose) to a “governmental entity”, then the right is for municipal water supply purpose. However, if the same right were issued to a non-governmental entity (e.g. a private developer) and later acquired by a “governmental entity”, then the right would need to be changed to municipal water supply purposes under RCW 90.03.380 because the right as issued did not then qualify as a municipal water supply purpose water right.

5. This section provides that some irrigation rights may be for municipal water supply purposes. Ecology considers irrigated acreage to be a limitation on the water right. If irrigated acreage is proposed to be increased under a municipal water supply right, then the provisions of RCW 90.03.380 must be met (e.g. annual consumptive quantity). This limitation will primarily affect rights for irrigation of parks and open space under this subsection where an acreage limit was described when the right issued.

RCW 90.03.260(4) & (5) Applications - Numbers of Connections and Population. This section provides that the maximum population or number of connections specified on an application or any subsequent water right documents for a municipal water supply right is no longer a limitation of the water right.

1. If a water system with 15 or more existing residential connections has a water right for community or multiple domestic supply, and the number of connections has been authorized by the Department of Health, the water right is for municipal water supply purpose and any population or connection limitation that may appear on the water right is not limiting. Rather, the instantaneous quantity (Q_i) and annual quantities (Q_a) are the controlling numbers.
2. If a water system with less than 15 existing residential connections has a water right that issued for a project proposing more than 15 residential connections, then such a water right may be conformed as a right for municipal water supply purposes under RCW 90.03.560 following actual physical service to at least 15 residential connections.
3. If a water system with less than 15 existing residential connections has a water right that issued for a project proposing fewer than 15 residential connections, then the number of connections intended to be served by the water right is a limitation on the water right and only a sufficient quantity of water necessary to serve those connections is authorized.

RCW 90.03.330(3) Appropriation procedure – Water right certificate: “Pumps and Pipes”
Certificates are in good standing. This provision provides that water rights issued based on system capacity (so-called “pumps and pipes” certificates) remain in good standing provided the permitted project progresses with due diligence. This addresses the concept in the *Theodoratus* case that no perfected right exists beyond the extent that a beneficial use has actually and legally been made. (*Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998)).

1. In a water right change application process or an adjudication process, there can be a diminishment of the water right whereas in other circumstances, they may not be.
2. Inchoate water rights “in good standing” arose based on Ecology’s past erroneous practice of issuing pumps-and-pipes certificates to municipalities (*Department of Ecology v. Theodoratus*). Such rights may continue to be used for growth in those communities. However, inchoate water rights “in good standing” may not be speculatively transferred for the development of projects not originally contemplated when the permit issued. For example, Water System A has a municipal water supply right in good standing with inchoate water. Such a water right can be used for continued growth in that community. However, the inchoate water right could not be transferred to Water System B to serve growth in that community.

RCW 90.03.386(1) ***Coordination between Department of Health and Department of Ecology.*** This section requires Ecology to coordinate review and approval procedures to ensure compliance and consistency with water system plans/small water system management programs. Ecology and the Department of Health are working on a Memorandum of Understanding (MOU) that will clearly outline the agencies' roles and responsibilities.

RCW 90.03.386(2) ***Place of use and determinations of "not inconsistent" with specified local plans.*** This section provides that a municipal water supplier's authorized place of use on its water right can change to its current water system service area, provided it has an approved water system plan or small water system management program and that alteration of the water right place of use is not inconsistent with other local planning documents. Ecology and Health's draft interpretive statement on this section was circulated for public comment on February 17, 2006 and can be found on Ecology's website at http://www.ecy.wa.gov/programs/wr/rights/muni_wtr.html. Ecology and the Department of Health will incorporate information from this draft into a Memorandum of Understanding (MOU) that will clearly outline the agencies' roles and responsibilities.

RCW 90.03.386(3) ***Water conservation as a part of an approved water system plan / small water system management program.*** This section describes the responsibility for a municipal water supplier to implement a water use efficiency/water conservation program, and directs Ecology to consider such implementation when considering development schedules for municipal water supply rights.

1. See Ecology POL-1050 for guidance on extending development schedules for municipal water suppliers.
2. Ecology supports the Department of Health's rule on water use efficiency/water conservation for municipal water suppliers.
3. Ecology has statutory mandates to encourage conservation and eliminate waste. In some cases, Ecology's may base water allocation decisions on conservation criteria more stringent than those provided in the Department of Health's rule. Such instances may include but are not limited to those that occur in the context of a new appropriation under RCW 90.03.250 or RCW 90.44.060, in a waste determination under RCW 90.03.005, in coordination with watershed planning efforts under Chapter 90.54 / 90.82 RCW, or in drought permitting under Chapter 43.83B RCW.

RCW 90.03.550 ***Municipal water supply purposes – beneficial uses.***

1. Beneficial uses of water under a municipal water supply purposes water right can include benefits for fish and wildlife, water quality, or other instream resources/values; or implementing environmental obligations from a watershed plan under Ch. 90.54 RCW or Ch. 90.82 RCW. However, water must be specifically diverted or withdrawn from the authorized source for such purpose.

RCW 90.03.560 ***Municipal water supply purposes – Identification. "Conforming documents" and municipal water right changes and transfers.*** Water rights that meet the

242 definition under RCW 90.03.015 are for municipal water supply purpose and the
243 water right documents can be conformed to correctly identify the purpose of use.
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245 1. Purposes of use that can be conformed to municipal water supply purpose generally include those
246 identified in RCW 90.03.015 and RCW 90.03.550.
247 2. In general, agricultural irrigation purpose of use and dairy purpose of use cannot be conformed to
248 municipal water supply purpose of use, but rather must be changed under RCW 90.03.380.